

NTSB Order No. EA-5261

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of November, 2006

Respondent .

Docket SE-17662

The Administrator appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued on May 11, 2006, following an evidentiary hearing.¹ By that decision, the law judge affirmed in part and dismissed in part the Administrator's emergency order of revocation² issued against

² Respondent waived application of the 60-day statutory deadline applicable to emergency proceedings.

respondent's airman and medical certificates.³ The law judge found that respondent had violated section 67.413(a)⁴ of the Federal Aviation Regulations (FARs), but had not violated FAR section 67.403(a)(1).⁵ We deny the appeal.

At the beginning of the hearing, the law judge granted the Administrator's motion for summary judgment as to the section 67.413(a) violation. Neither the Administrator nor respondent has appealed that finding or the law judge's sanction, suspension of respondent's medical certificate pending receipt from respondent of requested information and a decision by the federal air surgeon that respondent meets the standards for issuance of a medical certificate. Therefore, the only issue on appeal is the law judge's dismissal of the falsification charge.

A short history of relevant events is useful in understanding the basis for the Administrator's intentional falsification charge. A chronology follows:

April 16, 1996 - Respondent's driver's license is suspended for driving under the influence of alcohol (DUI).

³ In addition to his airman certificate (private pilot certificate) and medical certificate, respondent also possesses a mechanic certificate.

⁴ Section 67.413(a) -- 14 C.F.R. Part 67 -- authorizes the Administrator to suspend, modify, or revoke all medical certificates if an individual fails to provide (or authorize to be provided) additional medical information or history the Administrator has determined is necessary to determine whether the holder meets the medical standards for issuance of a medical certificate.

⁵ Section 67.403(a)(1) -- 14 C.F.R. Part 67 -- as pertinent, prohibits a person from making fraudulent or intentionally false statements on an application for a medical certificate.

June 3, 1998 - Respondent applies for a third class medical certificate. He fails to report the 1996 driver's license suspension.

February 18, 2000 - Respondent's medical certificate is revoked for failing timely to report the 1996 conviction and failing to disclose it on his 1998 medical certificate application.

March 7, 2000 - Respondent applies for a second class medical certificate, and in completing that application respondent properly answers "yes" to Question 13 regarding whether his medical certificate had "ever been denied, suspended or revoked."

April 24, 2003 - Respondent applies for a second class medical certificate, and in completing that application respondent incorrectly answers "no" to Question 13 regarding whether his medical certificate had "ever been denied, suspended or revoked."⁶

The Administrator presented no witnesses at the hearing, and, instead, relied on the written documentation contained in FAA airman, medical, and enforcement files. Respondent testified in his defense, and was the only witness at the hearing. The Administrator argued that it was not credible for respondent not to have remembered the December 1999 revocation when he completed the 2003 application and, therefore, his answer on the application was intentionally false. Respondent claimed that he did not purposely answer Question 13 incorrectly in filling out his 2003 medical application, and claimed that there was no reason for him to falsify his application.⁷

⁶ The record contains medical applications covering 1998, 1999, 2000, and 2003.

⁷ During his direct testimony, respondent explained:

I sat down very calm and clearly, took my time
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The test to be applied to determine whether a statement is intentionally false is found in Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), which states that the elements of

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answering. And without another form, a previous form in front of me, to the best of my knowledge answered everything, to my knowledge, correctly. My line of thought when I read that [Question No. 13] was I've never had a medical denied and I never had a medical revoked. I had it suspended because of the pilot license suspension.... The first time after the initial 1999 issue I had answered the question correctly. There was no deferment to my medical. I walked out of that office with a medical that day. It expired three years later. I reapplied, I answered a question wrong unintentionally. But, if that question had stated have you ever had a medical denied, suspended or revoked, there's no question whether or not I would have answered it correctly. But it didn't ask that question.

Transcript (Tr.) at 30-31. Later, during cross examination, the following exchange occurred between the Administrator's counsel and respondent:

Question: "[I]f you had known that that question covered suspensions you would have answered that question, yes."

Answer: "Yeah."

Tr. at 44. Soon after that dialogue, counsel for the Administrator asked:

Question: "[Y]ou believed that your medical certificate had been suspended versus revoked, correct?"

Answer: "That was the mind thought that I was under. I certainly didn't answer the question on purpose wrong. I mean, why would I?"

Tr. at 45. Thereafter, respondent reiterated: "I accidentally marked the wrong question. By no means was I trying to hide anything from anybody in this situation. There is nothing to, there is no reason to. I mean, why, I know you guys keep your records." Tr. at 46.

intentional falsification are: 1) a false representation; 2) in reference to a material fact; and 3) made with knowledge of its falsity. The law judge found that respondent did not intentionally falsify the 2003 application but, instead, acted negligently and apparently made a mistake.⁸ He noted that information on respondent's prior revocation was contained in the Administrator's records.

On appeal, the Administrator challenges the law judge's findings and conclusions. The gravamen of the Administrator's argument, however, is that the law judge erred in concluding that respondent's false statement was negligent rather than intentionally false.⁹ In reply, respondent repeats the arguments

⁸ The law judge likened the situation to one where pilots had been directed to turn left and turned right, resulting in a loss of separation they clearly did not intend. This observation is not germane to the issues raised in an intentional falsification case, for cases involving operational violations of the FARs typically do not require any showing of scienter whereas it is necessary in an intentional falsification case to present evidence that a false statement was made with knowledge of its falsity. Nonetheless, it is clear from the context of the law judge's discussion of the evidence that he believed respondent's explanation that he did not knowingly make a false statement on his medical application.

⁹ The Administrator also challenges the law judge's implication that, because FAA records contained information that respondent's certificate had been revoked, it was not important that respondent answer that question accurately on the application. The maintenance of the integrity of the system of qualification for airman certification, which is vital to aviation safety and the public interest, depends directly on the cooperation of the participants and on the reliability and accuracy of the records and documents maintained and presented to demonstrate compliance. Administrator v. Cassis, 4 NTSB 555, 557 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd, Cassis v. Helms, 737 F.2d 545 (6th Cir. 1984). The law judge's observations that the Administrator already had information about the revocation, and
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he made at trial, and adopts the law judge's findings.

After careful review of the record, we are constrained to affirm the law judge. Our precedent (see Administrator v. Smith, 5 NTSB 1560, 1563 (1986) and cases cited there) holds that resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge. We may not reverse the law judge simply because, on the appellate record, we might come to a different conclusion.¹⁰ See Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988) (the Board will reverse a law judge's finding when witness testimony is "inherently incredible"). The law judge has the opportunity to observe the witnesses while they are testifying and thus has insights into their veracity that review of a written record does not provide.

The law judge observed that respondent "obviously should have known about" the revocation and "did know about that." Tr. at 54. Nevertheless, the law judge found that respondent had not

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that respondent had previously properly reported the revocation on his prior medical application, does not excuse or minimize the importance of respondent's failure to accurately answer question number 13. However, on this record, we acknowledge that the observation was germane to the law judge's assessment of the credibility of respondent's claim that the incorrect answer he provided was unintentional.

¹⁰ For example, we find it difficult to believe that anyone of respondent's background and accomplishments, and someone who has spent his life in the aviation industry, learning to fly when he was 16, would forget the adverse revocation action taken against his certificate a mere 3 years before. Similarly, we are certain that respondent must realize the importance of accurate answers on his medical application.

intentionally falsified the application, crediting respondent's exculpatory claim that his incorrect response on the medical application was unintentional.¹¹ It is clear from the law judge's discussion of the hearing evidence that the law judge believed respondent checked the wrong box on the application inadvertently. Unfortunately, the Administrator did not call any witnesses, and, we think, did not aggressively cross-examine respondent regarding his exculpatory claims. It may well be that respondent had a motive to intentionally falsify his airman application in order to timely obtain a medical application without delay, which, if demonstrated, would have been relevant to the credibility assessment of his claim to have made an inadvertent error; the Administrator, however, did not vigorously pursue such evidence. Therefore, upon review of the record and the Administrator's arguments on appeal, we are constrained to conclude that we have no basis to characterize the law judge's credibility determination in favor of respondent arbitrary or capricious.

¹¹ The Administrator also argues that respondent made similar arguments in connection with his previous enforcement action. Clearly, this allegation would be relevant to respondent's credibility, but no such evidence was proffered at the hearing and this allegation remains unsubstantiated in the record.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's initial decision is affirmed.¹²

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

¹² The law judge's indefinite suspension of respondent's medical certificate, as imposed by the law judge, and unappealed by the Administrator, remains in effect.